



THE CITY OF SAN DIEGO

August 11, 1999

Honorable Wayne L. Peterson
Presiding Judge, San Diego County Superior court
Hall of Justice
P O Box 2724
San Diego CA 92112-2720

Dear Judge Peterson:

SUBJECT: RESPONSE TO GRAND JURY REPORT

Enclosed is the City of San Diego's response to the report of the 1998-1999 San Diego County Grand Jury, which was developed by the City Attorney and my staff, after an intensive review of the Grand Jury's recommendations. This response is to the report entitled "Manipulating the City of San Diego's Ultra-Low Flush Toilet Contract Award."

Sincerely,

MICHAEL T. UBERUAGA
City Manager

MTU:sml

Enclosures

cc: Honorable Mayor and City Councilmembers



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CITY OF SAN DIEGO RESPONSE TO GRAND JURY REPORT

"MANIPULATING THE CITY OF SAN DIEGO'S ULTRA-LOW FLUSH TOILET CONTRACT AWARD"

Pursuant to Penal Code section 933.05, the City of San Diego provides the following responses to the above entitled Grand Jury Report.

FINDINGS:

1. The City disagrees with the finding. The selection panel, which included an individual who is not a City employee, was never contacted by any Council members or Council staff regarding the Ultra-Low Flush Toilet (ULFT) contract award process, other than at a public Council meeting. The panel's rating of Pacific Gateway Group (PGG) was significantly lower than their ratings of the other proposers, and the Comparative Summary of Ultra-Low Flush Toilet Rebated Program Proposals" submitted to the Council by the panel contained numerous critical comments regarding PGG's qualifications.
2. The City disagrees with the finding. Although PGG received a lower overall rating than the other proposers, and did not meet the financial condition standard that was contained in Exhibit K of the Request For Proposals (RFP), City regulations pertaining to consultant selection pursuant to an RFP process do not require the selection committee to reject a consultant's proposal which does not conform to the RFP. Only in competitive bid situations is the City required by law and City policy to reject a bid which is nonresponsive.
3. The City disagrees with the finding. The "Total Program Cost" which the vendors were required to submit was the amount of actual expenses the vendor anticipated it would incur to run the program, not the amount the vendor intended to charge the City. The "Cost per Rebate" and "Cost per Verification Inspection" figures that the vendors submitted were the costs which the vendor proposed to bill to the City for each application processed or each inspection completed. Staff reviewed and analyzed the figures submitted, as is required by Administrative Regulation 25.70, using a common, industry accepted methodology of calculating the maximum amount of the contract, in addition to the "cost per item" figures, assuming that program goals would be met. In every case, PGG's costs are lower than Volt VIEWtech's or Honeywell DMC's.

4. The City disagrees with the finding. The City staff did not substitute the City's projected program costs for the "Total Program Cost" figures submitted by the vendors in the presentation made to Council. The staff submitted to Council both the staff's calculation for projected annual costs, along with the unit cost per rebate processed, verification and disposal/recycling figures provided by the vendors.
5. The City disagrees with the finding. The Council did not violate Council Policy 300-7 by awarding the ULFT contract to PGG. Council Policy 300-7 requires that consultant's presentations be "uniformly evaluated on a weighed basis of qualifications." This standard allows the Council to use independent judgment to evaluate the proposals, and allows the Council to disagree with the staff conclusions and recommendations. The only limitation to the Council's discretion contained in Council Policy 300-7 is that cost cannot be the sole factor that is considered. As indicated in the grand jury report, the Council made comments on the record that indicated that while the Council gave great weight to the issue of cost, the Council considered several factors other than cost in awarding the contract.
6. The City disagrees with the finding. The City's consultant selection regulations and policies allow the Council to disagree with the staff's conclusions regarding the consultants' qualifications under the RFP. The Council's disagreement with the staff evaluation of PGG is not an indication that the Council ignored the RFP, but is the result of the Council using its own judgment to view PGG's proposal and determine whether PGG was qualified under the criteria set forth in the RFP.
7. The City disagrees with the finding. The grand jury investigated possible conflicts of interest on the Council with regard to the ULFT contract, and concludes in its report that none of the Council members who had past ties to PGG have any current financial interests related to the company. The City Attorney's Office recently issued Memorandum of Law 99-3, which concluded that a Council member with past ties, but no current financial interest, in PGG was not legally disqualified from voting on the award of the contract. (See MOL 99-3, which is attached).
8. The City disagrees with the finding. A consultant contract is one which involves expert or professional services, which cannot be routinely provided by City staff. San Diego Municipal Code section 22.3003, Council Policy 300-7, Administrative Regulation 25.70. The scope of service for the ULFT Rebate Program contract clearly fits this definition of consultant services. As set forth in Section III of the RFP, the contract called for the provision of professional services such as management of program operations, recruitment and training of staff, development of publicity materials and a marketing strategy, development of an application process

and tracking system, developing and overseeing a marketing outreach program to increase participation, and accounting and financial procedures.

9. The City partially agrees with the finding.

(A) While there was a gap in service due to change in vendors, it was not a gap of six weeks. The City processed some rebates during the transition, and an amendment was negotiated with PGG to process some of the interim rebates.

(B) PGG is being paid at the rate approved by Council, and the contract will be less expensive with PGG than if Volt VIEWtech had been selected.

(C) The City agrees that on February 23, 1999, PGG was issued a letter of default for entering into an agreement with the Bank of Coronado to assign monies due under the contract without prior City approval. Upon notification of the default, PGG chose not to go forward with the assignment.

(D) The City agrees that on March 29, 1999, PGG was issued a letter of default for not processing 43 rebates within the 15 day rebate processing requirement of the contract.

RECOMMENDATIONS:

- 99-82. The City disagrees with the recommendation. The Council acted within its discretion to award the contract to the vendor which it determined was the best choice. The contract defaults noted in the grand jury report under Finding #9 do not rise to a level warranting termination of the contract.
- 99-83. The City disagrees with the recommendation. All of the listed items were considered prior to the award of the contract.
- 99-84. The City disagrees with the recommendation. The only potential conflicts of interest identified by the grand jury did not involve current financial interests in PGG or its members, therefore, those Council members were not legally required to recuse themselves from voting on the award of the contract.
- 99-85. Pursuant to the recommendation, the City Manager will review the guidelines governing the processing of competitive bids and consultant service proposals to determine if those guidelines sufficiently provide for the inclusion of proposed costs in the presentation of competitive bids and proposals to City Council.

- 99-86. Pursuant to the recommendation, the City Manager will review the guidelines which relate to the classification of City contracts as consultant contracts, to determine if those guidelines appropriately distinguish between consultant contracts and competitive bidding contracts.